IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.69 OF 2001

Employees' State Insurance
Corporation & Ors. ...Appellants

Vs.

M/s.Krishnaveni Hatmag Vinkar
Sahakari Society Ltd. ...Respondent

Shri R.M.Jaikar i/by M/s. M.V.Jaikar & Co. for the Appellants.

Shri M.D. Sugavkar for the Respondent.

CORAM : ABHAY S. OKA, J.

DATE : AUGUST 31 AND SEPTEMBER 04, 2006.

JUDGMENT:

1. The submissions of the learned counsel appearing for the parties were heard on the last date and the judgment was reserved. Today, the Appeal is kept for dictation of judgment.

2. The Appeal is preferred under section 82 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the ESI Act). The Appeal will lie only on a substantial question of law. The Appellant-Employees' State Insurance Corporation and its officers have taken exception to the judgment and order dated 18th September, 1995 passed by the learned Judge of the Employees' Insurance Court, Solapur. By

the impugned judgment and order, the learned Judge of the ESI Court allowed the Application filed by the Respondent under section 75 of the ESI Act. By the impugned judgment and order, the learned Judge held that the Respondent was not a factory within the meaning of section 2(12) of the ESI Act and its members are not employees within the meaning of section 2(a) of the ESI Act. The learned Judge restrained the first Appellant- Corporation from recovering any contribution from the Respondent on the basis of order dated 20th March, 1985.

3. For the purposes of appreciating the submissions made by the learned counsel appearing for the parties, it will be necessary to refer to the facts of the case. The Respondent is a society registered under the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the said Act of 1960). The Respondent-Society had a work-shed situated on Final Plot No.34, sub-plot No.44, New Pacha Peth, Solapur. The shed originally belonged to another society which got amalgamated with the Respondent-society in the year 1976. According to the Respondent the work-shed was meant for use for preparation of back process required for handlooms. There was a winding machine of the Respondent-Society

which required aid of power. The said winding machine became operational on 15th November, 1980. The winding machine was used for winding of yarn which was used for production of bed-sheet etc. According to the case of the Respondent, the said Society used to supply yarn beams prepared on the winding machine to its members on job work basis charging 50 paise per bundle and the Respondent-Society was never involved in manufacture of handloom bed-sheets etc. According to the Respondent the object of the society was to supply raw material to its members and to purchase finished product from the members. After receipt of the finished goods from the members, the Society used to deduct the price of raw-material supplied by it to the members and balance amount of price of the finished goods was being paid as salary to its members. According to the case of the Respondent, infact the amount was being paid by way of production charges. The contention of the Respondent was that the staff working in the shed never exceeded four and therefore, work-shed was not a factory. It was contended by the Respondent that on or about 09th December, 1981 the inspector appointed by the first Appellant visited the shed and he prepared a report in English language. On the basis of the report, the Appellants intimated to the Respondent on 21st June,

1989 that the Society was covered under the Act from 16th September, 1976.

4. According to the case of the Respondent though the inspector was to visit the shed on 06th May, 1983, on the request made by the Respondent the visit was postponed. On 13th May, 1983 show-cause notice was served to the Respondent demanding contribution of Rs.76,552.75/- for the period between 16th September, 1976 to 30th September, 1982. It was contended that the demand for contribution was illegal and was barred by limitation. The other contentions raised in the Application were that the work-shed was not a factory and the members who were paid wages by the Respondent were not employees within the meaning of the ESI Act.

5. The Appellants contested the Application made by the Respondent by filing written statement. The contention raised by the Appellants is that the Respondent-Society was manufacturing sarees, bed-sheets, chaddars, towels etc. from 16th September, 1976. The Respondent placed reliance on letter dated 09th December, 1981 submitted by the Secretary of the Respondent-Society. According to the case of the Appellants, the Secretary disclosed in the said letter that number of employees who are working

for wages were hundred and that they were continuously employing more than 13 persons from 16th September, 1976. The Appellants in the written statement pointed out other factual statements made in the said letter. The contention of the Appellants is that the Respondent falls within definition of factory under section 2(12) of the E.S.I Act. It was contended in the written statement that the Respondent obtained three phase connection on 31st October, 1980. It was submitted that the Respondent-Society was fully aware about coverage of the E.S.I. Act as is reflected from letter dated 09th December, 1981 submitted by the Secretary of the Respondent. Reliance was placed on inspection of the muster-cum-wage role maintained by the Respondent which according to the Appellant showed that 114 persons were employed for wages with the Respondent-Society. It was contended that though the workers may be the members of the Respondent the fact remains that they are being paid salary as evidenced by the record maintained by the Respondent. It was submitted that the Application under section 75 may be rejected.

6. Parties were permitted to adduce evidence by the E.S.I. Court. The learned Judge of the E.S.I. Court held that the Respondent has established that

provisions of E.S.I.Act are not applicable to the establishment of the Respondent and the Respondent was not covered by the definition of factory.

7. The questions of law which arise for consideration in the Appeal are as under:

(a) Whether the establishment of the Respondent can be termed as a factory within the meaning of section 2(12) of the E.S.I.Act?

(b) Whether the weaver members of the Respondent who are engaged in process of manufacture of Bed Sheets, Towels etc. on their own handlooms are employees within the meaning of section 2(9) of the E.S.I.Act?

(c) Whether the amounts which are admittedly being paid to the weaver members by the Respondent-Society can be termed as wages within the meaning of section 2(22) of the E.S.I.Act?

On earlier date when this Appeal was heard, I had indicated to the learned counsel appearing for the parties that the aforesaid substantial questions of

law arise in this Appeal and the Appeal will be heard on the said questions. Accordingly, the learned counsel have made submission of the said questions.

8. The detailed submissions have been made by the learned counsel appearing for the parties. The learned Counsel appearing for the Appellant submitted that the establishment of the Respondent was clearly covered by the definition of factory under the E.S.I.Act. He submitted that the amounts which were being paid by the Respondent to its weaver members were by way of remuneration for manufacturing the final products. He submitted that the weaver members of the Respondent-Society will have to be termed as employees within the meaning of section 2(9) of the E.S.I.Act. He invited my attention to the oral evidence led by the parties. He placed reliance on a letter dated 09th December, 1981 submitted by the Secretary of the Respondent. He has also placed reliance on reports of inspection which clearly show that as on 16th September, 1976 power was being used in the premises of the Respondent for Pirn machine, Cone machine, Sizing machine and Grill machine. He invited my attention to the correspondence and other material on record. He submitted that admittedly the Respondent was employing more than 100 employees and

therefore, the Respondent attracted coverage of E.S.I.Act. He has placed reliance on several decisions, a reference to which is made in the later part of the judgment.

9. The learned Counsel appearing for the Respondent submitted that the findings which are recorded by the learned Judge of the E.S.I.Court are essentially findings of facts based on appreciation of oral and documentary evidence on record and therefore, no substantial question of law arises. He submitted that the Appeal under section 82 of the E.S.I.Act is available only on substantial questions of law. He submitted that whatever is stated in letter dated 09th December, 1981 signed by the Secretary of the Respondent cannot be construed as any admission on the part of the Respondent. He submitted that whether the E.S.I.Act is applicable to the Respondent or not is a question which cannot be decided on the basis of alleged admissions in the said letter but same will have to be decided on the basis of evidence on record. He invited my attention to different portions of the evidence. He has also placed reliance on several precedents. He submitted that the manufacturing activity is being carried out by individual members of the Society and the said activity is admittedly not

carried on in the premises of the Respondent and therefore, sub-section 12 of section 2 of the E.S.I.Act will have no application. He submitted that even assuming that the weaver members of the Respondent-Society can be termed as the employees, none of them were working in the premises of the Respondent and going by the evidence on record at no stage there were 10 or more employees working in the premises of the Respondent. He has also placed reliance on various decisions.

10. I have carefully considered the submissions made by the learned Counsel appearing for the parties. The Respondent examined one Mehboob Kadar Yadgir who was working as an accountant with the Respondent for a period of 13 years. His responsibility was of maintaining the accounts of the Respondent. He stated that the Respondent-Society is engaged in supplying raw-material to its members and after the finished products like bed-sheets, carpets, towels etc. are made by the members, the Respondent-Society calculates cost of finished products. According to him the Respondent-Society works out the cost of the finished products taking into consideration the cost of raw-material like yarn. He stated that after considering the cost of raw-material and dying

charges, rest of the cost is charged as production charges. He stated that what is being distributed to the members are production charges and not wages or salary. His version is that from the year 1976 the Respondent-Society was using two work-sheds for back processing work. From the year 1980 the back processing work was being done by using electricity supply. He stated that in the year 1979 the Respondent-Society purchased a winding machine. According to him from the year 1976 to 1984 there were four staff members engaged by the Respondent including himself. The other three staff members were the secretary Shri Laxminarayan Alle, an accountant and a peon. He stated that from 15th November, 1980 the winding machine is operated on electricity supply. He stated that on the winding machine, two workers were employed from 1976 to 1982 and except winding machine, no other machine was operated on electricity supply. He stated that the final product is made by the members of the Society on the handlooms owned by the respective members which are not operated on electricity supply. He stated that from 1976 to 1982 the handlooms kept in the shed of the Respondent were not in use. In his evidence, he referred to production- wages register. He was cross-examined by the Advocate for the Appellants. In the

cross-examination his attention was invited to the Register at Exhibit U-43. Referring to one entry on page 39 of the said document, he stated that total wages of Rs.126/- for the month of February 1975 are shown against the name of a particular member. He explained that it includes weaving charges, processing charges and profit share. He admitted that such break-up was not shown. He stated that details of the same are not shown in any document. He stated that he has maintained register of members. The total wages paid to the members in respect of their work provided in the shed as well as their work on the handloom is mentioned in the record. However, split up of various items is not shown. He placed reliance on audit report. He admitted that the wage register maintained by the Respondent bears names of the members of the Respondent-Society who were 102 in number. He stated that entries in Form No.O-1 have been entered by the Respondent voluntarily. He was shown letter dated 09th December, 1981 and he admitted that it was signed by the Secretary of the Respondent.

11. The Respondent examined one Ambaji Nampalli who was in the employment of the Western Maharashtra Weavers Centre Association, Solapur. He stated that he was assigned duty of quality check-up and working

out cost of products. He stated that the Respondent-Society was a member of the said Association. He stated that the said Association was supplying raw-material to the Respondent and finished products were being furnished by the Respondent to the said Association. He stated that during the period from 1976 to 1982 there was no production in progress in the establishment of the Appellants and there were three to four staff members.

12. In the cross-examination he admitted that his duties were not connected to the accounts in respect of production supplied by the Respondent. He admitted that establishment of Western Maharashtra Weavers Centre was covered by the E.S.I.Act.

13. The Appellant examined Shri P.V.Janardhan who was working as an Inspector at Solapur between the period from 1980 to 1983. He stated that he visited the establishment of the Respondent on 09th December, 1981 and submitted his report on 10th December, 1981. He stated that he also submitted an undertaking obtained by him from the Secretary of the Respondent-Society and the Form No.0-1 duly signed by the Respondent. He proved in evidence the extract of muster-cum-wage register which was prepared by him.

In the cross-examintion he stated that prior to his visit there was no record available with the Appellant as regards the Respondent. He denied the suggestion that the Secretary of the Respondent was not knowing English and he volunteered to state that the Secretary had a working knowledge of English. He stated that he was unable to remember whether only winding machine was operated at the time of his visit. He stated that he was unable to remember whether only three to four workers were working on the winding machine at the time of his visit. He stated that he did not enquire at the time of his visit whether the members of the Respondent were having handlooms at their residence. The Appellants also examined one Shri Yashwant Govind Joshi who was working in the relevant period as an Inspector. He stated that he visited the establishment of the Respondent and submitted report dated 16th August, 1984. He stated that after inspecting relevant register, he found that 20 workers were employed for wages and compliance was not being made with the provisions of the E.S.I.Act. He stated that he submitted the report to Director of E.S.I.Corporation. He stated in the cross-examination that prior to 13th August, 1984 he had never visited establishment of the Respondent. He stated that during his visit he did not verify actual workers

engaged by the Respondent for wages.

14. The Preliminary Inspection Report which is exhibited on record of the Trial Court discloses that one Shri Laxminarayan Alle was at the relevant time the Secretary of the Respondent. It also discloses against column No.4 thereof that work carried on in the factory/establishment was of manufacture of bed-sheets/towels/chaddars/wall hanginings etc. It records that from 16th September, 1976 power is being used on four machines mentioned therein. The column No.7 records that it has been reported there are some home workers, the details of which were not furnished. It records that as on the date of the visit there were 114 employees.

15. A strong reliance has been placed by the Appellant on a letter dated 09th December, 1981. As states earlier, the said letter is admittedly signed by the Respondent's secretary Shri Laxminarayan Rajayya Alle. In the said letter the Secretary stated about manufacturing the sarees, bed-sheets, chaddars etc. by the Respondent from 16th September, 1976. He stated that the pern machine, cone machine and grill machine are being operated on power. It is stated that number of employees working in the premises is

100 and the Respondent was continuously employing more than 20 from 16th September, 1976. It is, however, stated in the letter that all workers were having membership of the Society. This is broadly the material on record apart from notices and O-10 Form.

16. In the light of this factual matrix, the questions which are framed for consideration will have to be answered.

17. At this stage, a reference will have to be made to the definition of "factory" which is found in sub-section 12 of Section 2 which reads thus:

> (12) "factory" means any premises including the precincts thereof-
>
> (a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or
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> (b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in

any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on,

but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed;"

Sub-section 22 of section 2 defines "wages" which reads thus:

"(22) "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes (any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and) other additional remuneration, if any, (paid at intervals not exceeding two months), but does not include-

(a) any contribution paid by the employer to any pension fund or provident fund, or under the Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge;"

Sub-section 9 of section 2 will be also relevant for consideration which defines the word "employee":

"(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

[and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or

branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment] [or any person engaged as apprentice, not being an apprentice engaged under the Apprentice Act, 1961 (52 of 1961), or under the standing orders of the establishment; but does not include]-

(a) any member of [the Indian] naval, military or air forces; or

[(b) any person so employed so employed whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] a month:

. Provided that an employee whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government} at any time after (and not before) the beginning of the contribution

period, shall continue to be an employee until the end of that period;]"

18. The first question which is to be decided is whether the Respondent is covered by the definition of factory under sub-section 12 of section 2. Reliance was placed by the Advocate appearing for the Respondent on a decision of the Apex Court in the case of **Nagpur Electric Light and Power Company Ltd. Vs. Regional Director, Employees' State Insurance Corporation Ltd. (AIR 1967 Supreme Court Page 1364).** The question before the Apex Court in the said decision was whether certain employees of the Nagpur Electric and Power Company Ltd were the employees within the meaning of section 2(9) of the E.S.I. Act. The business of the said company was of transforming and transmitting electrical energy. The premises of the said company were located within a compound wall. From a receiving station inside the premises, the company was transmitting energy through supply lines to the sub-stations in the city and from sub-stations to the consumers. The High Court had recorded a finding that the Appellant before the Apex Court was carrying on manufacturing process not only in the building called the work-shed or the receiving station

but over the whole area over which process of transmission of electricity is carried out including sub-stations where electricity is stored and supplied to the consumers by further transmission lines. The High Court held that every part over which this process was carried out will be a factory. This line of reasoning by the High Court was disapproved by the High Court in the said case. However, in the same decision, the Apex Court held that though some of the employees may be working outside the factory, since their duties are connected with the work of the factory, they are employees within the meaning of sub-section 2(9)(i). In the said decision, the Apex Court held that:

> "The factory does the work of transforming and transmitting electricial energy. All the workers in question including the clerks and the administrative staff are engaged in connection with this work. None of them is employed in any separate establishment unconnected with the work of the factory.
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> 11. **Some of the employees work outside the factory, but their duties are connected with the work of the factory. They are**

therefore employees within the meaning of S.2(9)(I). Some are employed in the sub-stations. It is common case that the sub-stations are not independent factories. The sub-stations attendants attend to work which is directly connected with the work of the factory at the main station. They are therefore employees within the meaning of S.2(9)(I)".(Emphasis supplied)

19. It will also be necessary to refer to another decision of the Apex Court in the case of **M/s. Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur (AIR 1987 Supreme Court Page 1166)**. The Apex Court in paragraph No.4 of the said decision held thus:

". The definition of an 'employee' under the Act has a wider meaning. **The employees who worked outside the business premises but those whose duties are connected with the business are also 'employees' within the meaning of S.2(9)(i) of the Act (See Nagpur Electric Light & Power Co. Ltd. V. Regional Director, Employees' State Insurance Corporation, (1967) 3SCR 92: (AIR 1967 SC**

> **1364)**. Even those employees who are paid daily wages or those who are part-time employees are employees for purposes of the Act. Hence we do not find any merit in this Special Leave Petition. The petition, therefore, fails and its is dismissed."(Emphasis supplied)

20. The definition of factory employed by ESI Act is very wide. The said definition of factory will have to be appreciated in the light of the view taken by the Apex Court in the case of Nagpur Electric Light & Power Co. Ltd. (supra). Even if any employee is working outside the premises of the Respondent in this case, if his duty is connected with the work of the Respondent, he becomes an employee within the meaning of sub-section 12 of section 2. Though the members might have been working away from the worksheds in their own premises, their duty is certainly connected with the work of the Respondent.

21. In the present case, we are concerned with the definition of factory prior to 1989 amendment of the ESI Act. The unamended definition of the factory reads thus:

> "S.2(12) "factory" means any premises including the precincts thereof whereon twenty of more persons (are employed or were employed for wages) on any day of the proceeding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the (Mines Act, 1952 (35 of 1952) (or a railway running shed)."

Thus, the requirement of the statute was a factory means any premises including precincts thereof whereon 20 or more persons are employed or were employed for wages on any day of the preceding 12 months. The definition of the word "factory" will have to be read in the context of the decision of the Apex Court. Even if some of the employees work outside the premises of the factory in connection with the work of the factory, they will have to be treated as employees for considering the definition of the word "factory". Therefore, merely because all the employees are not working in the same premises, it cannot be said that definition of the word "factory" under section 2(12) of the ESI is not attracted.

22. In the present case the other question is whether the amounts received by the members of the Respondent-Society can be termed as wages and whether they become employees of the Respondent though they are members of the Respondent.

23. Shri Mahiboob Yadgir who was examined by the Respondent stated that the Respondent-Society used to manufacture bed-sheets, blankets, carpets, towels etc. The Respondent-Society used to supply raw-material like yarn to its members who used to work on their respective handlooms and give back the final product to the Respondent. According to him the Respondent-Society used to work out cost of the finished product taking into consideration cost of raw-material like yarn, dying charges and rest of the cost was charged as production charges which used to be distributed among the members. He stated that from the year 1976 the Respondent-Society is in possession of two sheds for back process work. He stated that from the year 1980 the back process is in operation on electricity supply. He stated that in the year 1979 the Society purchased a winding machine. Thus, there is no dispute that the Respondent-Society is involved in carrying out manufacturing activity. Reliance was placed by the learned counsel appearing for the

Respondent on the decision of Division Bench of Kerala High Court in case of **E.S.I. Corporation Vs. Vattiyoorkavu H.W. Co-operative Society (1997 I CLR 689)**. Paragraph Nos.4 to 7 of the said decision reads thus:

> "4. In the instant case, PWs.1 and 2 gave evidence to the effect that the members of the Society are being given yarn by the society and the finished products are supplied to the Society and they are being paid by paying the difference in the price of yarn and the finished products. **There was no evidence to show that the members were being paid any wages. There was no evidence to show that the members were being paid any wages**. There was no evidence to show that the members were working within the premises of the Society using the looms owned by the Society. As per the definition of 'employee' given in S.2(9) of the E.S.I. Act, 'employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies. So, the crucial question to be considered is whether any wages were paid to the

members of the Society. By the nature of the functioning of the Society, it appears that all the members of the Society share the profit according to the quantity of the finished products and the price of the yarn is collected from the members. It cannot be said that the members of the Society were working as employees and they were earning therefrom.

5. In Regional Director, Employees State Insurance Corporation V. Taj Textiles Industrial Co-operative Society Ltd. 1980 KLT 199-it was held that a member of a Co-operative Society is distinct from the society as such which is a legal person. The property of a Co-operative Society does not belong to the members, but to the Society and therefore, they are covered by the E.S.I. Act. In that case, it was found that there was employer-employee relationship between the Co-operative Society and the members of the Society. The above decision was rendered in the background of the facts and circumstances of the case. **There can be**

situation where the members of the Society work as the employees of the Society and the Society would certainly come within the purview of the E.S.I. Act. In a case, where the members of the Society are not the workers of the Society, E.S.I. Act has no application.

6. The decision reported in M/s P.M.Patel & Sons & Ors. v. Union of India and Ors. 1985 II CLR 322 is a case where the employees are doing their work of beedi rolling in their own houses and they were working under a contractor. It was held that the work was not being supervised and controlled by the employer. Therefore, there was no employer-employee relationship. It was held that the rolling of beedies at home and delivering them to the manufacturer subject to the right of rejection create employer-employee relationship and that the work of rolling beedies was not of a sophisticated nature of work requiring control and supervision at the time when the work is done. This decision has no application to the facts of

the case in hand.

> 7. In the decision reported in Employees' State Insurance Corporation, Hyderabad v. M/s. Laxmi Power Loom Weavers Co-operative and Sales Society Ltd. 1986 LAB IC 370- it was held that the Society gave employment to its members as part of its scheme for self employment and therefore, it was not covered by the E.S.I.Act, it was held that the jural relationship of master and servant cannot be attributed by mere fact of members happened to work for remuneration."(Emphasis supplied)

The said decision cannot be read as an authority for the proposition that in no case members of a co-operative society can be treated as employees. Paragraph No.4 of the said decision shows that the view taken by the Division Bench of the Kerala High Court was in the facts of the case before it. Infact, in the same judgment the Division Bench has observed that there can be a situation where members of the society work as the employees of the society and in such a case Society would certainly come within the

purview of the ESI Act.

24. The learned counsel appearing for the Respondent also relied upon decision of the Andhra Pradesh High Court in the case of **Employees' State Insurance Corporation, Hyderabad Vs. M/s. Laxmi Power Loom Weavers Co-operative and Sales Society Ltd. Warangal and etc. (1986 LAB I.C. 370)**. In paragraph No.9 of the said decision the Division Bench held thus:

> "9. While agreeing with the view of the Kerala and Madras High Court that the members of the society can be employees of the society we dissent with the view that members working for remuneration become employees of the society simply because the society is a distinct entity from its members because of its corporate status. We are of the opinion that the Insurance Court must enquire into the question whether the members of the society are in fact employees and a contract of employment of members by the society is established. **If on the other hand, the members of the society are working under the self**

> **employment scheme and receiving remuneration therefor they cannot be treated as employees within the meaning of the Act**."(Emphasis supplied)

25. The learned counsel appearing for the Appellant relied upon a decision of Division Bench of the Madras High Court in the case of **Pondicherry State Weavers Co-operative Society Ltd. Pondicherry Vs. Regional Director of Employees' State Insurance Corporation Madras (1983 LAB I.C. 902)**. In paragraph No.11 the Division Bench held thus:

> "11. **It is well established that a co-operative society, on registration, becomes a body corporate with a perpetual succession and it is legally independent of its members who constitute the society**. This is made clear by S.38 of the Pondicherry Co-operative Societies Act, 1972. **Once the society is independent of its members and has a separate legal existence apart from its members, then there is no bar for the society employing its members and there being a contract of employment between the society and its**

> **members. If such a contract of employment is entered into between the society and its members, then the members so employed should be taken to have two independent capacities- one as a member of the society and the other as an employee of the society**. We do not thing that there is any merger of the said two positions on capacities. **One's position as a shareholder is different from one's position as an employee of the society**."(Emphasis supplied)

26. The letter dated 09th December, 1981 signed by the Secretary of the Respondent clearly records that the Respondent was manufacturing sarees, bed-sheets, towels etc. from 16th September, 1976. The description of the machine used in the manufacturing process is also given in the said letter. He stated that members of the Respondent-Society (total 100 in number) were employees working with the Respondent. The notice issued claiming contribution by the Appellant relates to the period commencing from 16th September, 1976. It is pertinent to note that the secretary who admittedly issued letter dated 09th December, 1981 has not been examined as a witness. It

is not the case of the Respondent that Secretary had no authority to write such a letter. The clinching admissions in the said letter could have been explained by examining the author of the said letter. The person who was examined before the court was an accountant. The Respondent produced before the ESI Court a Register which showed the names of several members of the Respondent Society who had received wages. In the cross-examination, the attention of the said witness Shri Mahiboob Yadgir was invited to the entry made in respect of a particular member against whose name total wages of Rs.126/- for the month of February 1975 were shown in the register. The witness stated that the said amount includes weaving charges, back processing charges and profit share. He, however, stated that such details are not shown in any document. He also admitted that the amount of total wages is entered in general ledger and the said amount is shown in the audit report of the Respondent. In the further cross-examination he stated that in the wage register names of the workers have been shown. He volunteered to state that wage register bears the names of members who were about 102 in number. He stated that the Respondent had assigned work to 29 members, therefore, their names appear in the register. A case was sought to be made out by the

Respondent that there were only four employees of the Respondent who were receiving the wages. However, the witness admitted that he has not filed wage register containing entries of the said four employees. He admitted that entries in Form No.O.1 have been entered by the Respondent voluntarily in which seven names of the employees have been disclosed. In the cross-examination he admitted the signature of the Secretary on letter dated 09th December, 1981. Thus, the scenario which unfolds is that there is a register maintained known as the "Wage Register" by the Respondent which discloses that wages were paid to more than 20 employees who were incidentally the members of the Respondent. The witness examined by the Respondent tried to explain that though term wages has been used, it includes cost of production, back processing charges, bonus and profit share. However, the said witness admitted that at no place, in the record maintained by the Respondent-Society, such bifurcation has been mentioned. Moreover, in letter dated 09th December, 1981 it is clearly stated that there were 100 employees working in the premises of the Respondent. If it was the case of the Society that what was being paid was the difference between the market value and cost of production, it was for the Respondent to examine some of the employees to

prove that they were not receiving wages. As indicated in earlier part of this judgment, the definition of wages is very wide under the ESI Act. It means all remuneration paid or payable to an employee in terms of contract of the employment express or implied. Thus, the entries made in the wage register atleast show that remuneration was paid to the members by the Respondent which otherwise a member was not entitled to claim.

27. In this view of the matter it is very difficult to accept the view taken by the Trial Court by holding that the amounts which were paid by the Respondent to its members were by way of production charges. There was no evidence at all to come to such a conclusion. The inference drawn by the Trial Court was totally contrary to evidence on record. In the facts of the case, from the evidence led by the Respondent and from what is stated in the letter written by the secretary of the Respondent, it is obvious that what was being paid to the members was remuneration which was covered by the definition of wages. Thus, the members of the Respondent were being paid wages within the meaning of the E.S.I Act. As held earlier, the said members will have to be treated as employees though they were wokring outside work

shed as their work was connected with the work in the work sheds of the Respondent. Thus, the said members will have to be treated as an employees within the meaning of the E.S.I Act. From the admissions in letter dated 09th December, 1981 and from the register of the Resopndent on record it is clear that there were more than 20 employees wokring at the relevant time. Thus, the defination of "factory" will squarely apply to the Respondent.

28. Therefore, the view taken by the Trial Court is completely erroneous. The Appeal must succeed.

29. Hence, I pass the following order:

(i) The impugned Judgment and Order dated 18th September, 1995 is quashed and set aside and Application made by the Respondent being Application No.22 of 1987 stands dismissed.

(ii) There will be no orders as to costs.

JUDGE